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In the Supreme Court of the United States

OCTOBER TERM, 1957.

Case No. 583.

CITY OF WASHINGTON COURT HOUSE, OHIO,
Plaintiff-Appellee,

vs.

DELORACY CARSON,
Defendant-Appellant.

JURISDICTIONAL STATEMENT.

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Defendant-Appellant.

JURISDICTIONAL STATEMENT.

OPINIONS BELOW.

1. (a) Court of Appeals of the Second District of Ohio, City of Washington Court House vs. Deloracy Carson, 76 Ohio Law Abstract 56.

Municipal Court Opinion is in the Appendix—not reported.

JURISDICTION.

(b) (i) Proceedings are criminal, the Defendant claiming double jeopardy, a violation of the 5th Amendment of the United States Constitution.

(ii) The date of the judgment in the Municipal Court of Washington Court House, Ohio was May 27, 1955. The Supreme Court of Ohio denied a rehearing on March 27, 1957.

Notice of Appeal to the United States Supreme Court was filed May 17, 1957 in the Supreme Court of Ohio.

(iii) The Constitution of the United States of America, specifically referring to the Fifth Amendment of "What constitutes double jeopardy?" confers on this Court jurisdiction of the appeal.

(iv) The following cases sustain the fact that this Court has jurisdiction:

Yoder vs. State, 90 P. 2nd, 669 (Oklahoma);
Commonwealth vs. Micheli, 154 N. E., 586 (Massachusetts);
McCarthy vs. Zerbst, Warden, 85 Fed., 2nd, 640;
Clawans vs. Rives, 104 Fed., 2nd, 240 (District of Columbia).

22 *Corpus Juris Secundum*, Section 252, the editor says:

"* * * and if the indictment or information is valid and is dismissed without accused's consent, after jeopardy has attached, he cannot be prosecuted again for the same offense."

(v) The Fifth Amendment to the Constitution of the United States which is involved in this case reads as follows:

"* * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; * * *"

(c) The record shows that on November 3, 1954 Patrolman Scott charged the defendant with driving on the streets of Washington Court House while under the influence of intoxicating liquor by filing an affidavit in Municipal Court of said city in Case No. 5929. Said affidavit shows it to be acknowledged before said clerk.

Appellant in Case No. 5929 was tried by a jury and jury disagreed and then dismissed. Thereafter the charge

was dismissed by the Judge upon application of the city solicitor.

Three days after the dismissal by the city in Case No. 5929, said Patrolman Scott again filed a new affidavit in the Municipal Court of Washington Court House in Case No. 6519, charging the Defendant with exactly the same offense at the same time and the affidavit was stated in exactly identical words.

The Appellant claims that dismissal of the first Affidavit by the city without her consent or knowledge was the end of any prosecution against her, for that offense.

Appellant further claims that the filing of the second Affidavit in the exact language of the first is a violation of the Fifth Amendment of the Constitution of the United States of America which provides:

> "No person shall be twice put in jeopardy for the same offense."

QUESTIONS PRESENTED.

The following questions are presented by this appeal:

1. When is a person in double jeopardy?

2. Was the Defendant denied the benefits afforded her by Article I, Section 10 of the Constitution of Ohio which say, in part: "No person shall be twice put in jeopardy for the same offense"?

3. Was the Defendant denied the benefits afforded her by the Fifth Amendment of the Constitution of the United States of America which says, in part: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb"?

STATEMENT OF THE CASE.

(d) The undisputed facts in this case are as follows:

On the 3rd day of November, 1954, an affidavit was filed in the Municipal Court of Washington Court House, Ohio in Case No. 5929 by Patrolman Rodman Scott, charging the defendant by stating:

> "unlawfully did operate a motor vehicle upon the public streets of Washington, while under the influence of intoxicating liquor."

The Affidavit in all respects appears to be a valid and legal instrument and the acknowledgment appeared to have been taken by the Clerk of the Municipal Court, Ruth Glass.

The Defendant to that affidavit entered a plea of "Not Guilty"—requested a trial by jury. A jury was impaneled on December 2, 1954, the evidence was submitted to the jury both by the City of Washington and by the defendant. The Judge charged the jury and after deliberating several hours the jury informed the Court that they were hopelessly deadlocked and could not agree at which time they were dismissed.

The case was again assigned for trial on January 13, 1955 but postponed because the date was not satisfactory to the city solicitor.

Thereafter on February 9, 1955 the Judge of the Municipal Court without the consent of the defendant but upon the application of the City of Washington filed a Journal Entry which reads as follows:

> "Upon application of the City of Washington, this case is hereby ordered dismissed without prejudice to a future action."

Thereafter on the 21st day of February, 1955 the affidavit found in Case No. 6519 was filed by Rodman Scott against the defendant. The affidavit is in exactly the same

form, exactly the same words, charging exactly the same offense on the same day as is found in the affidavit in Case No. 5929. The affidavit filed on the 21st day of February 1955 on the face of it showed a good and valid instrument.

Thereafter the defendant filed a Motion in the Municipal Court of Washington Court House, Ohio, alleging that the charge found in No. 6519 amounted to double jeopardy since the case was dismissed by the City of Washington without her knowledge or consent and since the affidavit found in Case No. 6519 is exactly the same charge as was found in Case No. 5929 allegedly having taken place at the same time, at the same place, and violating the same law.

The Court overruled said Motion and the defendant was required to proceed to trial which was held May 23, 1955—a verdict of "Guilty" was returned by the jury.

After the jury was impaneled in the Municipal Court on May 23, 1955, but before any evidence was offered, the defendant made a similar Motion as shown from the Bill of Exceptions, page 28, claiming double jeopardy, said Motion was overruled by the Judge.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL.

(e) In the case at bar, the transcript shows that the defendant was charged, tried before a jury and the jury discharged because they were unable to reach a verdict and thereafter the charge against the defendant was dismissed by the City of Washington without the defendant's knowledge or consent.

Three days after the dismissal of Case No. 5929, there was filed in the same Court an affidavit charging exactly the same offense at the same time in the same words in a new case that was numbered 6519.

The Defendant immediately made a Motion to have the second charge against her dismissed as it would amount to double jeopardy in violation of the Fifth Amendment to the Constitution of the United States.

The facts are not in dispute. Under the facts, does the dismissal of the action and the filing of a new affidavit in a new action constitute double jeopardy?

The Defendant believes it does.

22 *Corpus Juris Secundum*, Section 238 at page 369 is authority for the following statement:

> "The fact that the result of upholding a plea of former jeopardy will be that accused will go without sentence or punishment for an offense to which he had pleaded guilty does not alter his rights or change his position as to his right to plead former jeopardy."

In the case of *State vs. Panchuk*, 207 N. W., 991, 53 N. D., 669:

> "Importance of right
>
> Right not to be put in jeopardy second time for same offense is as important and should be as scrupulously regarded as right to trial by jury."

In the case of *Donata vs. U. S.*, C. C. A. N. J., 48 F. 2nd, 142, 143:

> "The constitutional prohibition is not against double punishment, but against being 'twice put in jeopardy,' double trial."

The elements of former jeopardy seem to be as follows:

(1) Upon a valid indictment or information.

(2) Before a Court of competent jurisdiction.

(3) After he has been arraigned.

(4) After he has pleaded to the indictment of information.

(5) When a competent jury has been impaneled and sworn.

A plea of former jeopardy is not a matter which goes to the question of the innocence or guilt of the accused. It is just the question of whether or not jeopardy attached.

In the case of *McCarthy vs. Zerbst, Warden*, 85 Fed. 2nd, 640, the Court said:

"One is not in jeopardy until he has been arraigned on valid indictment, or information, has pleaded, and Jury has been impaneled and sworn and where case is tried to a Court without a Jury, jeopardy begins after accused has been indicted and arraigned, has pleaded and court has begun to hear evidence."

The case at bar, the transcript shows that the Defendant had been arraigned:

(a) On a valid affidavit.

(b) The Defendant pleaded not guilty to said charge.

(c) A jury was impaneled to hear the evidence.

(d) The jury was unable to agree on a verdict.

(e) The Court dismissed the case without the Defendant's knowledge or consent.

Certainly, under those facts, jeopardy attached.

In the case of *Commonwealth vs. Micheli*, 154 N. E. 586 (Massachusetts) the Court said:

"Dismissal of a criminal complaint, made without the defendant's consent, after witnesses have been heard, will support a plea of former acquittal, though dismissal at defendant's request or with his consent or for his benefit does not bar second trial."

We believe that a dismissal made without the defendant's consent after witnesses have been heard amounts to double jeopardy and a violation of the Fifth Amendment to the United States Constitution.

In the case of *Yoder vs. State*, 90 P. 2nd. 669 (Oklahoma), the Court said:

> Under constitutional provision and common law principle therein declared, no one can be twice lawfully punished for the same offense, and hence, when a Court, either by its own Motion or on county attorney application and in furtherance of justice, orders following a mistrial an action to be *dismissed* on payment of statutory costs and such costs are paid by the defendant, power of the Court as to that offense is at end and that Court or any coordinate Court is without jurisdiction to render a 2nd judgment and sentence on the same charge.
>
> "Jeopardy" in its constitutional and commor law sense has a strict application to criminal prosecutions. The word jeopardy as used in the constitution signifies the danger of conviction and punishment which a defendant in a criminal prosecution incurs when put on trial before a Court of competent jurisdiction under an indictment or information sufficient in form and substance to sustain a conviction.
>
> Where on the trial of Defendant in Superior Court of Seminole County on a charge of larceny of a domestic animal Jury failed to agree and was discharged and Court ordered case to be dismissed on payment of costs, a part of the penalty of the offense charged, defendant being thereafter charged with same offense in District Court of same county was twice put in jeopardy as forbidden by constitution and his conviction would be set aside."

In the State of Ohio, the following comment was made in the case of *State vs. Martin*, 154 O. S. 538, 43 O. O. 501, page 507:

"the usual test accepted by test-writers on criminal law and procedure is this: If the defendant upon the first charge could have been convicted of the offense in the second, then he has been in jeopardy."

One of the early cases in Ohio is the case of *Mitchell vs. State*, 42 O. S. 383, Syllabus No. 1 in part, says:

"the constitutional inhibition against a second trial for the same offense, embraces all criminal prosecutions and the rule is that the accused is once in jeopardy, when the plea of not guilty is interposed to a valid indictment, and the jury is sworn."

The question raised by the State is: "was there a valid affidavit?"

On the face of the affidavit it seems to be regular in form. If it was not an affidavit then there would be no reason to dismiss the case.

It is hard to conceive how a defendant could be charged with a crime, brought to trial, made to defend before a jury and then have the prosecution dismiss the action without the consent of the defendant, without having been once in jeopardy.

How does the defendant know that the second affidavit is any more valid than the first one?

If the jury had acquitted the defendant in Case No. 5929 instead of being discharged, then would the prosecution still insist that the defendant had not been in jeopardy and continue to file affidavits until they could get a jury that would convict?

If that would be the law, just how would any defendant know when there would be an end to his case in Court?

Every defendant has the right to believe that when he is arrested upon an affidavit filed that it is valid. After either an acquittal or dismissal of the proceedings in the case he has the right to rely upon the constitutional pro-

visions that he cannot again he tried for the charge contained in that proceeding.

When a case is dismissed, it is dismissed for all purposes. In a criminal proceeding there is no such thing as a dismissal, "without prejudice" without the consent of the defendant.

The statement found in Ohio Jurisprudence, 12 *O. J.* 225, would indicate that after a charge of illegal voting was dismissed, the prosecution could not again charge the defendant with that offense.

In case of *Duvall vs. State of Ohio*, 111 O. S., 657, Syllabus No. 3 reads as follows:

> "3. A conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other. A single act may be an offense against two statutes; and if either statute requires proof of an additional fact, an acquittal of the offense requiring proof of the additional fact does not exempt the defendant from prosecution and punishment under the statute which does not require proof of such additional fact."

In the case at bar, both affidavits being the same, both charges being for the offense allegedly committed at one and the same time, it follows as night the day, that the defendant was in jeopardy in Case No. 5929 and cannot be held to answer in Case No. 6519 because in so doing, it would be a violation of the defendant's rights as guaranteed to her under the Constitution of the United States of American and the Constitution of the State of Ohio.

The facts in this case show that the defendant was in jeopardy in Case No. 5929 and the Motion to dismiss

the charges in Case No. 6519, after the Jury was impaneled and before any evidence was taken, should have been sustained because this action amounted to double jeopardy in violation of the constitutional rights of the defendant as guaranteed to her under the Constitution of the United States of America.

This Court should reverse the decisions of the lower Courts and discharge the defendant.

Respectfully submitted,

J. HARVEY CROW,

Attorney for Defendant-Appellant.

APPENDIX.

OPINION OF THE MUNICIPAL COURT.

Case No. 6519.

WASHINGTON COURT HOUSE MUNICIPAL COURT,
WASHINGTON C. H., OHIO.

CITY OF WASHINGTON,
Plaintiff,

vs.

DELORACY CARSON,
Defendant.

OPINION.

May 4, 1955.

Upon consideration of defendant's motion to dismiss the charges filed herein as amounting to double jeopardy, and memoranda of counsel upon the legal questions involved, the Court finds that said motion is not well taken, and should be overruled. While the Court is ever conscious of the necessity to uphold the constitutional rights of parties appearing herein, the interpretation of the weight of authority, by the editors of Ohio Jurisprudence to the effect that to constitute former jeopardy a person must have been put on trial on an indictment or affidavit good and sufficient as to form and substance, which would have warranted a conviction, if the criminal act had been proved, answers the question in this instance. Defendant cannot well contest at this stage that the original affidavit was good and sufficient, since, she, through her counsel, first raised the question of sufficiency at the conclusion of plaintiff's testimony at the trial. Furthermore, it is noted

that the Superior Court of Ohio in the case cited by defendant in support of her contention (42 Ohio State 383), stated the rule that the accused is once in jeopardy, when the plea of not guilty is interposed to a *valid indictment*.

MAX G. DICE (signed),

Judge, Municipal Court of Washington C. H., Ohio.

OPINION OF THE COURT OF APPEALS.

No. 280.

IN THE COURT OF APPEALS

OF FAYETTE COUNTY, OHIO.

CITY OF WASHINGTON COURT HOUSE, OHIO,

Plaintiff-Appellee,

VS.

DELORACY CARSON,

Defendant-Appellant.

OPINION

(76 Ohio Law Abstract 56.)

(Rendered on November 2, 1956.)

MILLER, *P. J.*

This is a law appeal from a judgment of the Municipal Court of Washington Court House, rendered upon the verdict of a jury, finding the defendant guilty of operating a motor vehicle upon the public streets of Washington C. H. while under the influence of intoxicating liquor in violation of Ordinance No. 506 A of said city.

The record reveals that on November 3, 1954 an affidavit was filed in said court charging the defendant with the offense of operating a motor vehicle on the public streets of said city while under the influence of intoxicating liquor; that a plea of not guilty was entered; that a jury trial was had which resulted in failure to reach a verdict, and for this reason the jury was discharged.

It appears that during the course of the trial the defendant moved for a dismissal of the action because of the

insufficiency of the affidavit. This motion was overruled at the time and the trial proceded. However, it appears that after further consideration and before assigning the case for retrial the court made the following entry of dismissal on March 18, 1955, to wit: "Upon application of the City of Washington this case is hereby ordered dismissed without prejudice to a future action." Thereupon, a new affidavit charging the same offense was filed in the same Municipal Court. A motion to dismiss this affidavit was then filed for the alleged reason that the defendant had been placed in jeopardy under the second affidavit would constitute double jeopardy which is prohibited by both federal and state Constitution. The Court in overruling the motion to dismiss stated in its opinion, which is made a part of the record in this case, "The defendant cannot well contest at this stage that the original affidavit was good and sufficient, since she, through her counsel, first raised the question of the sufficiency at the conclusion of plaintiff's testimony at the trial."

Furthermore, it is noted that the Superior Court of Ohio in the case cited by defendant in support of her contention (42 O. S. 383), stated the rule that the accused is once in jeopardy when the plea is interposed to a *valid indictment*. (Emphasis ours.) The evidence produced before the Court on this motion does not appear in the record, but from the foregoing statement it is clear that the trial judge found that the first affidavit was insufficient to state an offense; hence it was a void affidavit and the defendant was never in jeopardy under it. See *City of Columbus v. Jackson*, 93 O. App. 516, decided by this Court on October 6, 1952. The procedure adopted in this case was in accordance with our ruling in *Columbus vs. Jackson, supra*. We so held even when the defendant had entered a plea of guilty to the affidavit. *In re Van Hoose*, 61 O. L. Abs. 256.

We find further support for our conclusion in 12 *O. Jur.* 198, Section 161, wherein it is said:

> "In order that an accused may avail himself of the constitutional guaranty that 'no person shall be twice put in jeopardy for the same offense,' it is necessary that he should have been put on trial on an indictment or information good and sufficient as to form and substance, which would have warranted a conviction, if the criminal act had been proved. It may be stated as the general rule that where an indictment is quashed at the instance of the defendant, though after jeopardy has attached, he cannot thereafter plead former jeopardy when placed on trial on another indictment for the same offense.
>
> Hence, if the affidavit charging an offense is bad for uncertainty, the defendant is not thereby placed in jeopardy because no conviction could be sustained upon it."

We have examined the errors complained and find none of them well made. Among these the appellant complains that the court did not charge fully on the term "under the influence of intoxicating liquor." We find no error in the court's definition of this term, and if it was not complete as urged, it was an error of omission and not of commission; therefore, it could not be prejudicial. See 39 *O. Jur.* 1006, Sec. 297.

Finding no error in the record, the judgment will be affirmed.

HORNBECK AND WISEMAN, *JJ.*, concur.

JOURNAL ENTRY OF THE MUNICIPAL COURT.

Case No. 6519.

WASHINGTON COURT HOUSE MUNICIPAL COURT
WASHINGTON C. H., OHIO.

CITY OF WASHINGTON,
Plaintiff,

vs.

DELORACY CARSON,
Defendant.

JOURNAL ENTRY.
(May 27, 1955.)

It is therefore ordered that the defendant shall stand committed and be imprisoned in the City Jail for a period of 10 days, and shall pay a fine of $200.00 and the costs of prosecution, and said defendant shall stand committed and be imprisoned in said jail until said days are served and said fine and costs are paid or she is otherwise legally discharged.

It is further ordered that the defendant's license to operate a motor vehicle in the State of Ohio be suspended for a period of 1 year from the date hereof.

/s/ MAX E. DICE,
Judge.